NO. 11404

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD C. COMMERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Montana

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The brief of Appellee does not meet the contentions of Appellant at any point.

I.

We raise no question as to the validity of the Selective Service Acts. In lines 9 and 10 of page 46 of our initial brief we say: "We do not question *the power or the duty* of Congress to raise and equip armies for defense."

We add, however:

> "But we do question the right of Congress or of our people to conscript our boys to fight a war without assuming responsibilitity to them for the damage done to their bodies and their earning power in our defense—a portion of their lives expended in a public use—the same as we are responsible *to those who furnish equipment for our armies.*"

II.

Nor do the cases cited under Subdivision II of Appellee's brief make contact with the case we have made upon the right to sue.

Reid vs. U. S., 211 U. S. 529; Schillinger vs. U. S., 155 U. S. 163; De Groot vs. U. S., 5 Wall. 419, and U. S. vs. Babcock, 250 U. S. 328, are all Court of Claims cases, in which the only possible question which could be decided was whether the facts brought them within the Court of Claims Act. The Court of Claims being a court of limited and special jurisdiction it could not try any claim not coming within the enabling provisions of the Act.

Anything said by the Court in any of those cases beyond the needs of the case is *obiter dictum.*

Lynch vs. U. S., 292 U. S. 571; Silberschein vs. U. S., 266 U. S. 221, and Crouch vs. U. S., 266 U. S. 180, were all based upon the World War Veterans Act, and with the exception of the Lynch case involved no basic constitutional question such as is here presented. In the Lynch case the Court held the provisions of the Economy Act which repealed the War Risk Insurance provisions to be unconstitutional.

In Lockerty vs. Phillips, 319 U. S. 182, which dealt with the Emergency Price Control Act of 1942, the Court said that the plaintiff had taken the wrong route to the Supreme Court, in effect, however, holding that judicial review could not be prevented. The Court said:

> "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."

The reason counsel cannot cite decisions of the Supreme Court adverse to our contention is that there are none.

U. S. vs. Lee, 16 Otto 196, was decided in 1882. It is not necessary or profitable to search the decisions prior to the date of the Lee case, as that decision established the law as of that date.

The Lee case is conclusive upon the proposition that the United States may be sued without the consent of Congress upon a cause of action arising directly under

the Fifth Amendment, even though the United States was not named a party defendant. The effect of the decision was to eject the United States.

> "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party to the record, *but by the effect of the Judgment or decree which can here be rendered.*"
>
> Louisiana vs. McAdoo,
> 234 U. S. 627

Clearly the Lee case is absolute authority for our position.

The only case since the Lee case which passes upon the same question is Great Falls Mfg. Co. vs. U. S., 112 U. S. 645, decided three years before any consent to suit upon the constitution had been given by Congress.

It is also worthy of note that both the Lee case and the Great Falls Manufacturing Company case were accidents. That is to say, each arose over a disputed question of fact and of law. Congress has never attempted to confiscate insensate property for government use. It always provides for compensation if it deliberately takes such property. This accounts for the few caess in which the question of the right to sue upon a constitutional provision has arisen.

Furthermore, the prohibition against taking private property for public use without just compensation *is the only provision of the constitution or of its amendments*

which may in the final analysis require suit against the United States for its enforcement.

IN GENERAL

At no time have the constitutional rights of our war disabled been presented to any federal court for definition until the instant case was instituted.

The first question to be determined is whether the bodily integrity and earning power of a citizen can be destroyed or impaired in the public service without just compensation; in other words, whether the provisions of the Fifth Amendment were designed for the sole benefit of the profit making citizen, or whether they were designed to benefit *any* citizen whose property is taken for a public use.

Whether the 1A who is capable of making a good living by his earning power may be despoiled of that property, while the 4F who makes the same kind of a living from insensate property must be paid for his property, if taken for a public use.

Whether the power of eminent domain, when exercised in taking insensate property for public use, is coupled with the requirement that just compensation be paid, but when used to take the body of the citizen for war is coupled with no obligation to make restitution if bodily integrity and earning power are impaired or destroyed.

The requirements of "patriotism" are not as narrow as implied by the District Court.

"Patriotism", as defined by Webster, is an obligation of *all* citizens, not alone the soldier.

If it requires the gratuitous sacrifice of the body by the soldier—that is, without a reciprocal obligation to recompense—then it requires the gratuitous contribution by the civilian of his insensate property.

That the body of the citizen and his earning power are property, and that this property belongs to him, is admitted for the purposes of the motion to dismiss.

Indeed, this is true as a matter of law.

> "The right of property in a slave is distinctly and expressly affirmed in our Constitution. The right to traffic in it, like an ordinary article of merchandise and property, is also guaranteed to the citizens of the United States," etc.
>
> Scott vs. Sandford,
> 19 Howard 393.

This decision established beyond cavil that the human body is property and susceptible of ownership.

When the 13th Amendment ended slavery Dred Scott became the owner of his body and of his earning power, and instead of Sandford being able to trade in his body and his earning power, Scott could trade in it himself. The title to his body and his earning power reverted to him, and not to the United States, as the prohibition of the 13th Amendment extends to the United States as well as to its citizens. The United States does not own its citizens. That is a prerogative only of totalitarian states.

So, when the Declaration of Independence was made effective by the success of the Revolution, the citizen of the United States became a free man, the owner and proprietor of his body and the owner of his earning power, a commodity of the highest grade, as is evidenced by current events. Cities are dark and cold for want of the producing power of man.

The question of the forum in which suits by disabled veterans may be tried is not a matter for consideration at this time. It will arise when such a suit is brought.

However, the district court, the successor of the circuit court in which the Lee case and the Great Falls Manufacturing Company case were tried, is good enough for us.

Sec. 41, Title 28, U. S. C.

* * *

Counsel say that Congress has created "rights" by the World War Veterans Act of 1924.

That act created no "rights." It simply provided for charitable donations.

Furthermore, counsel apparently do not know that the World War Veterans Act was repealed *in toto* by the Economy Act of March 20, 1933, ironically styled "An Act to Maintain the Credit of the United States Government", but in reality an act to despoil the disabled war veteran.

Public No. 2, 73rd Congress

* * *

The Appellant, in common with the rest of the two or three million disabled men and women of World Wars I and II, has the right to have the questions presented by the petition determined as original propositions, untrammeled by the *obiter dicta* pronounced by the Supreme Court in cases not in point.

More human rights and human injustice is involved in this case than in all the cases decided by the Supreme Court during the entire period of its existence—including the Dred Scott case.

We submit that petitioner is entitled to a judgment as prayed for in his petition.

Respectfully,

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